IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4960 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

KAPILABEN SOMNATH SOMPURA & 1 - Petitioner(s)
Versus
THE CHIEF OFFICER & 2 - Respondent(s)

==========

Appearance :
MR MB GOHIL for Petitioner(s) : 1 - 2.
NOTICE SERVED BY DS for Respondent(s) : 1,
MR PS CHAMPANERI for Respondent(s) : 1,
MR UA TRIVEDI for Respondent(s) : 2 – 3
MR SATYAM CHHAYA, AGP for respondent Nos. 4 & 5.

==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 22/03/2007

ORAL JUDGMENT

1. Leave to join District Collector and the State of Gujarat, Urban Development Department as party respondents.

2. Rule. Mr. Chayya, learned AGP appears for the newly added party and waives service of rule for respondent Nos.4 & 5, Mr. Devang Bhatt with Mr. Champaneri waives service of rule for respondent No.1 and Mr. Trivedi waives service of rule for respondent Nos. 2 & 3.

3. The petitioners have preferred the petition for challenging the legality and validity of the order passed by the Collector and its confirmation thereof by the State Government, whereby the construction permission granted in favour of the petitioners are cancelled and the order is also passed for keeping the gap open as per the Sale Deed of the property in question.

4. Heard the learned advocates appearing for both the sides.

5. Upon hearing the learned advocates appearing for both the sides, it appears that the Municipality initially granted permission to the petitioners for construction without verification of the original Sale Deed on the basis of which, the petitioners had acquired ownership which inter alia provided for keeping common veranda/open space of 10.13 sq. mtr. The respondent No.1 approached before the Collector and the

Collector found that the construction permission was not properly granted by the Municipality and therefore, in exercise of the power under Section 6A of the Gujarat Town Planning and Urban Development Act (hereinafter referred to as 'the Act'), the order was passed by the Collector suspending the decision of the Mamlatdar and directing for keeping open space as per the Sale Deed. The matter was carried before the State Government and the order of the Collector was confirmed. It is under these circumstances, the petitioners have preferred the present petition.

6. When the matter was taken up for hearing for the first time on 22.02.2007, the following order was passed:

> “Mr. Gohil, learned counsel, under the instructions of the petitioners declares before the Court that all objectionable construction shall be made open, so as to clearly maintain the space of open to sky of 10.13 sq.mtrs., as per the position prevailing when the petitioners themselves purchased the property barring WC which was already in existence or the renovation of the same place of the same size. However, he submits that since the construction at the ground floor is the basis for construction at the first floor also, the petitioners would require time of about three months for altering the construction in a manner that an area of open to sky which was earlier in existence is maintained to the fullest extent and the petitioners are also ready to deposit the reasonable amount of cost towards the litigation for

respondent Nos.2 & 3.

In view of the above, ***Notice*** returnable on 8th March, 2007. There shall be status quo against the demolition on the condition that both the petitioners file undertaking before this Court of removal of the structure over the open to sky, which was in existence at the time when the petitioners purchased the property within a period of three months and actually remove such construction as per the undertaking. The undertaking shall be filed within a period of one week from today. There shall be additional condition for the aforesaid ad interim order for deposit of Rs.10,000/- towards probable cost of respondent Nos. 2 & 3 and the said amount towards cost shall be deposited with this Court within one week. It is made clear that on non-compliance to either of the conditions, the ad interim order shall automatically stand vacated."

Thereafter, the petitioners have filed the undertaking and the amount of cost of Rs.10,000/- is also deposited and Mr. Gohil confirms the said position.

7. It appears that Mr. Trivedi, learned counsel for respondent Nos. 2 & 3 has no objection if the petitioners are to comply with the declaration made before this Court, and for remaining construction, the petitioners are to make application for revised construction permission to the Municipality.

8. Mr. Champaneri, learned counsel for respondent No.1 Municipality stated before the Court that

if the application is made for construction of the revised development plan, the same shall be considered by the Municipality, keeping in view the title of the petitioners and the clause provided for keeping the gap open as per the Sale Deed.

9. Under the above circumstances, it appears that the principal aspect on the basis of which the power came to be exercised by the Collector as well as by the State Government was on the basis of the complaint of respondent Nos. 2 & 3 to the effect that the open space which was required to be kept of 10.13 sq. mtrs. was not maintained, and therefore, the Municipality had committed error in sanctioning the construction plan. The said grievance raised on behalf of the respondent Nos. 2 & 3 would stand satisfied in the event the declaration made before this Court and the undertaking filed for complying with such declaration, is acted upon.

10. Mr. Gohil, learned counsel for the petitioners submitted that three months time is given and therefore, I find that if the direction is given keeping in view the compliance of the undertaking and the reconsideration of the plan, no prejudice will be caused and further, the construction which otherwise could legally stand in the eye of law, can be allowed to be continued.

11.In view of the above, I find that following directions shall meet with the ends of justice:

A) The petitioners shall remove the construction by keeping the open space of 10.13 sq. mtrs. as declared and as per the undertaking, within a period of 3 months from 22.02.2007.

B) After the construction is removed for keeping the gap of 10.13 sq. mtrs., the petitioners shall move the appropriate application for sanction of the revised construction plan to the Municipality and shall also declare that the space for open to sky is duly maintained. Such will be within a period of two weeks from the demolition of the construction.

C) The Municipality shall verify that the open space of 10.13 sq. mtrs is maintained by the concerned petitioner as per the Sale Deed and shall also verify the other relevant aspects for sanctioning of the plan as per the bylaws read with relevant rules permitting the construction. The appropriate decision shall be taken by the Municipality, preferably within a period of 3 months from the date of submission of the plan.

D) In the event the construction is not removed by the petitioners, either as per the undertaking or if found at the time of verification by the Municipality, the Municipality shall demolish the offending structure so as to maintain the open space to sky of 10.13 sq. mtr., and either of the same shall be permitted after the expiry of the period of three months from 22.02.2007.

E) In view of the above directions, the order passed by the Collector and its confirmation by the State Government would not survive. However, it is clarified that if there is failure on the part of the petitioners to demolish the construction as per the declaration, the present direction shall not remain in operation and the Municipality shall comply with the order passed by the Collector and its confirmation by the State Government.

12. Petition is allowed in terms of aforesaid directions. Rule made absolute to the aforesaid extent. So far as the cost aspect is concerned, the petitioners have deposited the amount of Rs.10,000/-, out of the said amount, Rs.6,000/- shall be paid as cost to the respondent Nos. 2 & 3, Rs.2000/- as cost to respondent No.1 and

Rs.2,000/- as cost to respondent Nos. 4 & 5. As the amount is already deposited, the concerned party shall be at the liberty to withdraw the amount either themselves or through their authorised advocate.

(JAYANT PATEL, J.)

*bjoy